

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 15, 2003

**RONNIE L. JOHNSON, Petitioner/Appellant v.
STATE OF TENNESSEE, Respondent/Appellee**

**Direct Appeal from the Criminal Court for Wilson County
No. 5600 J. O. Bond, Judge**

No. M2002-03033-CCA-R3-PC - Filed January 16, 2004

Petitioner, Ronnie L. Johnson, appeals from the trial court's dismissal of his petition wherein he sought relief pursuant to the "Post-Conviction DNA Analysis Act of 2001," Tennessee Code Annotated sections 40-30-301 – 40-30-313. After review of the entire record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Ronnie L. Johnson.

Paul G. Summers, Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In 1982, Petitioner was convicted of aggravated rape and sentenced to life imprisonment and the conviction was affirmed on direct appeal. *State v. Johnson*, 670 S.W.2d 634 (Tenn. Crim. App. 1984). Petitioner subsequently filed a petition for post-conviction relief which was dismissed by the trial court. This was also affirmed on direct appeal. *Johnson v. State*, 733 S.W.2d 525 (Tenn. Crim. App. 1987).

In the case *sub judice*, Petitioner is seeking to have certain evidence from his trial, including bloody socks and sheets, to be subjected to DNA testing. Petitioner alleges that the testing will show his actual innocence of the crime for which he was convicted. The State filed a response in which

it asserted that there was no evidence in existence to submit to DNA testing. The Circuit Court Clerk of Wilson County, where the trial was held, filed a statement that after a diligent search for any physical evidence pertaining to Petitioner's case, nothing could be found. A notarized statement from a commander of the Lebanon Police Department was filed with the trial court. The statement said that after a diligent search, no physical evidence regarding Petitioner's case was found in possession of the Lebanon Police Department.

In this appeal, Petitioner asserts that the State does not oppose DNA testing if the evidence could be found. Petitioner states his issue on appeal as "what remedies exist when the State cannot comply with the terms" of the Post-Conviction DNA Analysis Act of 2001. Petitioner concedes that there is no evidence of "misconduct or sabotage" in the disappearance of any available evidence in Petitioner's case. However, Petitioner asserts that he is entitled to a new trial because the physical evidence has been lost or misplaced.

In its findings of fact in the order dismissing the petition, the trial court found that the records in Petitioner's case were lost through no overt act of any person. The trial court concluded that since there were no exhibits to be tested, the petition must be dismissed. The trial court did put a proviso in that if the exhibits were found, that it would order DNA testing upon proper application being made.

Tennessee Code Annotated section 40-30-303 provides as follows:

Notwithstanding the provisions of part 1 of this chapter, or any other provision of law governing post-conviction relief to the contrary, a person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

Tenn. Code Ann. § 40-30-303 (2003).

Tennessee Code Annotated section 40-30-304 provides as follows:

After notice to the prosecution and an opportunity to respond, the court shall order DNA analysis if it finds that:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;

- (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304 (2003).

Before DNA testing can be required, at a minimum, physical evidence must be in existence, and in such condition that a DNA analysis can be done. If the trial court finds that all materials which could have been tested have been destroyed, the petition must be dismissed. *Clinton Wayne Lynch v. State*, No. M2002-02801-CCA-R3-PC, 2003 Tenn. Crim. App. LEXIS 522 (Tenn. Crim. App. at Nashville, June 10, 2003), *no perm. to app. filed*.

Each of the four criteria of Tennessee Code Annotated section 40-30-304 must be present in order to grant relief under the petition for DNA analysis. Absent any one of the criteria, the petition cannot be granted. *William D. Buford v. State*, No. M2002-02180-CCA-R3-PC, 2003 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. at Nashville, April 24, 2003), *perm. to app. denied* (Tenn. 2003).

Petitioner asserts that this court should order a new trial because, otherwise, Petitioner has no remedy. Under the circumstances of this case, granting Petitioner a new trial is not an option which was authorized by the legislature in its enactment of the Post-Conviction DNA Analysis Act of 2001. While Tennessee Code Annotated section 40-30-309 provides for sanctions, including criminal contempt for a “knowing” violation of an order to preserve evidence, this provision applies *only* when the trial court has found that the petition should not be summarily dismissed, and orders that all evidence *in possession of the State* be subjected to DNA analysis.

Petitioner is not entitled to relief in this appeal.

CONCLUSION

For the reasons stated above, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE